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ALEXANDER L. STEVAS,
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82-385
No.

In the Supreme Court of the United States

October Term, 1982

HELEN B. O'BANNON et al.,
Petitioners

v.

JACK SHADIS et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Where a state provides funds for legal services for the poor through contracts with legal service programs, are provisions in those contracts by which the legal service programs agree not to request or accept attorneys' fees against the state or its employees invalid and unenforceable as violative of a public policy announced in a federal statute allowing an award of attorneys' fees in such cases, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988?

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit is as follows:

JACK SHADIS, BELLE FEINBERG, MARIE BURTON, Individually and on behalf of all other persons similarly situated,

Appellees

v.

FRANK BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania,

WILBUR E. HOBBS, Individually and as Deputy Secretary of the Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

LEO A. SULLIVAN, Individually and as Welfare Policy Specialist, Office of Basic Family Maintenance, Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

DON JOSE STOVALL, Individually and as Executive Director of the Philadelphia County Board of Assistance,

HELEN HYDE, Individually and as Director of Operations, Philadelphia County Board of Assistance,

JUNE REED, Individually and as District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

CYNTHIA ANDERSON, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

MILDRED DAVIS, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

and

AURELIUS ROBERTSON, Individually and as Casework Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

WILLIAM HARDEN, JOHN GRADY,

Appellants

Pursuant to Federal Rule of Civil Procedure 25(d), Helen B. O'Bannon, current Secretary of the Department of Public Welfare, is being substituted for her predecessor in office, Frank Beal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Helen B. O'Bannon, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, hereby petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered July 20, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit of which petitioners seek review is reproduced at 1a. The opinion and order of the district court is reproduced at 26a and is reported at 520 F. Supp. 858 (E.D. Pa. 1981).

II. JURISDICTION

The judgment of the Court of Appeals was entered July 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976:

In any action or proceeding to enforce a provision of §§1977, 1978, 1979, and 1981 of the Revised

Statutes (42 U.S.C. §§1981-1986), Title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

P.L. 94-559, 90 Stat. 2641 (1976), 42 U.S.C. §1988.

IV. STATEMENT OF THE CASE

For each fiscal year from July 1, 1975 through June 30, 1981, the Commonwealth of Pennsylvania, through its Department of Public Welfare (DPW), contracted with a private non-profit corporation known as Pennsylvania Legal Services Center, Inc. (PLSC) for the provision of legal services to low income persons. In exchange for state funding, PLSC agreed to provide legal services both itself and through sub-contracts with local legal service programs (LSPs) throughout Pennsylvania. One of these LSPs was Community Legal Services, Inc. (CLS), a private non-profit corporation providing legal services to the poor in Philadelphia.

Under those contracts, PLSC received approximately $10 million per year of which between $2.3 to $3 million was paid annually to CLS. Approximately 25% of these moneys were state funds; approximately 75% were received by Pennsylvania from the federal government under Title XX of the Social Security Act, 42 U.S.C. §1397, *et seq.*[1]

The contracts outlined the services to be provided. Those services included representation of the poor in a

[1] Title XX authorized grants to the states for a variety of social services to be determined in the state's discretion. Pennsylvania was not obligated to use any of these funds for legal services. Title XX was amended by the Social Services Block Grant Act of 1981, P.L. 97-35, §2351, *et seq.* 95 Stat. 867 (1981) to give the states even greater discretion in the use of federal funds for social services.

wide variety of civil matters, including litigation against the state and state employees. The DPW-PLSC contracts also required PLSC's subcontracts to contain certain terms, including those at issue in this case prohibiting the receipt of attorneys' fees under limited circumstances.

Specifically, the DPW-PLSC and the PLSC-CLS contracts for the fiscal year from October 1, 1979 through June 30, 1980 contained the following clause:

> The LSPs and the Corporation shall not request attorneys fees in any case brought against the Commonwealth or Commonwealth employees. In the event that any such attorney fees are awarded to the Corporation or LSPs, DPW will deduct the amount of fees so awarded from payment on the next invoice submitted by the Corporation. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

The contracts for the fiscal year from July 1, 1980 through June 30, 1981 contained the following clause:

> The LSP may not accept attorneys fees in any cases brought against the Commonwealth or Commonwealth employees. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

The present case was commenced in November 1975 by CLS on behalf of a class of medical assistance recipients under the Civil Rights Act of 1871, 42 U.S.C. §1983. Plaintiffs claimed violation of federal constitutional and statutory rights.[2]

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[2] The substance of plaintiffs' claim was that the Secretary and other officials of DPW had violated plaintiffs' due process

After succeeding on the merits, CLS sought attorneys' fees relying on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. In response to CLS's request, defendants, all of whom were Commonwealth officials, contended that the anti-fee provisions of the 1979-80 and 1980-81 contracts prohibited CLS from requesting or accepting fees, and that no award could be made to it.

By opinion and order dated August 17, 1981, the District Court held that the relevant contract provisions were void because they conflicted with the public policy expressed in the Attorney's Fees Awards Act. The parties had agreed that if attorneys' fees were permitted, their reasonable amount was $85,000. Accordingly, judgment was entered in that amount.

The Court of Appeals for the Third Circuit, by opinion and order entered July 20, 1982, affirmed the District Court's invalidation of the contract clauses. In so doing, the Court of Appeals found that the Attorney's Fees Awards Act established a public policy in favor of attorneys' fees awards in civil rights actions. Applying Section 178 of the Restatement (Second) of Contracts, the Court balanced that policy against the various interests supporting enforcement of the waiver provisions in the funding contracts. It found that policies against enforcement of the waiver provisions outweighed policies in their favor and, therefore, affirmed.

It is from that decision of the Third Circuit that defendants, petitioners herein, seek certiorari.

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rights in terminating medical assistance benefits and in operating the medical assistance program at eligibility levels in conflict with the federal Social Security Act and federal regulations. The Court prescribed injunctive relief requiring the reinstatement of class members to the program, and revised eligibility levels. A claim for damages was ultimately settled.

V. REASONS FOR GRANTING THE WRIT

This Case Raises Important Issues of Whether the Right To Request and Receive Attorneys' Fees Under the Civil Rights Attorney's Fees Awards Act of 1976 Is Waivable by a Party and Discretionary With a Court, and, If So, Whether a Court May Ignore That Legislative Judgment by Voiding Contract Provisions Which Seek To Waive the Right

The courts below have either incorrectly given the Attorney's Fees Awards Act of 1976 excessive weight or have applied erroneous federal common-law standards to declare a contract term void as against public policy, or both. These courts have made a statute authorizing attorneys' fees a mandate that cannot be waived and have interfered with the state's ability to fund social service programs through contracts. Ironically, the decisions, if allowed to stand, will likely impair the very statutory purpose they sought to promote.

The traditional American rule has been that each party to a lawsuit must bear its own attorney's fees. *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975). The Civil Rights Attorney's Fees Awards Act of 1976 (hereafter "the Act") was Congress's response to *Alyeska;* it gave the courts authority to award fees in certain kinds of cases. It did not, however, require an award of fees in any case, nor even that fees be considered unless a prevailing party requested them. By its terms, it made an award discretionary and the courts have acted ac-

cordingly. *Gagne v. Maher*, 594 F.2d 336 (2nd Cir. 1979), *aff'd.* 448 U.S. 122 (1980) (award reduced because counsel received public funding); *Zarcone v. Perry*, 581 F.2d 1039 (2nd Cir. 1978), *cert. denied* 439 U.S. 1072 (1979) (award denied where funds were available for a fee from judgment on the merits); *Brown v. Stackler*, 612 F.2d 1057 (7th Cir. 1980) (award denied completely because amount requested was excessive); *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979) (award denied because funds were available for a fee from judgment on the merits). Last term this Court reaffirmed the discretionary nature of a fee award under the Act. *White v. New Hampshire Dept. of Employment Security*, U.S. , 102 S.Ct. 1162, 1167, 1168 (1982). The courts below failed to give sufficient consideration to this discretionary nature of the Act.

A contract under which a party gives up certain rights in return for a valuable consideration can be declared void on the basis of a policy expressed in a federal statute only when that statute requires the relinquished relief, that is, makes it unwaivable. In *Muschany v. United States*, 324 U.S. 49, 66 (1945), this Court said:

> As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy.

In *D. H. Overmyer Co., Inc. v. Frick Company*, 405 U.S. 174 (1972), the Court held that even the constitutionally guaranteed rights to notice and hearing before a civil judgment were subject to contractual waiver.

Certainly, if basic constitutional rights can be waived by contract, there can be no general policy against the waiver of statutory rights and, as noted above, there is no

explicit prohibition of such a waiver in the Attorney's Fees Awards Act. To the contrary, since fees may clearly be waived implicitly by inaction—a failure to seek them—there is no statutory prohibition, either expressed or implied, against a more explicit waiver by contract in return for valuable consideration.

Both the District Court and the Court of Appeals purported to apply the Restatement (Second) of Contracts, Sec. 178. However, the Restatement, properly interpreted, could not result in invalidation of the contract provisions unless the Act was read as unwaivable and mandatory. The Restatement states:

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations.
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of a particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions;
>
> (b) the likelihood that a refusal to enforce the term will further that policy;

(c) the seriousness of any misconduct involved and the extent to which it was deliberate; and

(d) the directness of the connection between that misconduct and the term.

This section recognizes that contracts are presumed valid and that the entire contract must be reviewed before declaring one term invalid.

Federal courts that have applied the Restatement to invalidate contract provisions have done so only after finding that the contractual terms were directly and expressly prohibited by statute. *Jackson Purchase v. Local Union 816*, 646 F.2d 264 (6th Cir. 1981); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977). Similarly, a state court applying the Restatement held that:

> Enforcement will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh 'the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the contested term.'

Maryland National Capitol Park and Planning Commission v. Washington National Arena, 282 Md. 588, 607, 386 A.2d 1216 (1978). There the court upheld a term in a lease of land for a sports arena which prohibited the lessee from appealing any determination that improvements to the land were taxable. The court noted the benefits obtained by the lessee and the public as a result of the lease taken as a whole. Thus, the Restatement itself upholds contract terms unless the statutory policy prohibits relinquishment of the statutory right, especially where substan-

tial public interests support the contract and where the party attempting to enforce it has performed its part of the bargain.

The interests in enforcement here were substantial when considered in light of Pennsylvania's program for funding of legal services. Pennsylvania had no legal obligation to fund legal services at all, let alone to fund them through PLSC or CLS, or in any particular way or in any particular amount. *See Harris v. McRae*, 448 U.S. 297, 312-318 (1980); *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). However, Pennsylvania determined that the provision of free legal services by the state to its low income citizens was in the best public interests, a determination that neither CLS nor the lower courts question.

Likewise, providing services through fixed sum funding contracts with legal service programs was in the public's best interest. With their funding known in advance, the legal service programs could hire staff, rent space, buy supplies, cover litigation expenses and develop a practice expert and efficient in the delivery of legal services to the poor. In fact, the contractual funds were paid, and these goals were accomplished. These results were consistent with the policies underlying the Attorney's Fees Awards Act, and were more likely to assure civil rights enforcement on behalf of the poor than the uncertain possibility of attorneys' fees awards.

The definition of funding was also in the public interest because it allowed the state to fully and rationally allocate its available social service funds. In this connection, part of the state's legitimate interest was protection from further uncertain financial liability to the agencies it had

already supported. The state also had a legitimate interest in avoiding time-consuming litigation over attorney's fees motions by attorneys on both sides of a case whose primary duty was representation of public interests.

Nothing in the record or in logic suggests that the state tried to "buy immunity" from suits by legal services attorneys, that CLS would not have sued the state unless it could recover attorneys' fees or that such a provision would have altered the identity of the defendants in actions brought by CLS clients. The contracts permitted, and, indeed, provided funding for suits against the state, and legal services to the poor must inevitably involve litigation arising out of the complex welfare programs administered by the State. Thus the state funded a program that would inevitably sue it; in exchange it asked only for an agreement that its financial contribution to this program be defined in advance.[8]

In light of the substantial interests supporting the contractual clauses prohibiting attorneys' fee requests, and the correct standards for invalidation of contracts on public policy grounds, the clauses should stand unless the federal statute or federal policy makes attorneys' fees both unwaivable and mandatory. Nothing in the Act suggests that a prevailing plaintiff must seek attorney's fees and cannot waive them, either implicitly, by inaction, or explicitly, by agreement. Moreover, despite legitimate policy interests supporting fee awards, even when sought, such awards are clearly discretionary. For the courts below to reach their results they had to either ascribe a mandatory, unwaivable

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[8] CLS has not claimed that the amount of attorneys' fees that it would have recovered but for the contracts exceeds the amounts received under them.

effect to the Act in contradiction of its express terms or apply erroneous standards for review of contracts that allowed them to override the legislative judgment that the Act had neither effect. To correct either of these errors this Court should issue a Writ of Certiorari to review this case.

CONCLUSION

The Court should issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review its judgment entered July 20, 1982.

Respectfully submitted,
LEROY S. ZIMMERMAN
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By ALLEN C. WARSHAW
Chief, Special Litigation Section
JOHN O. J. SHELLENBERGER
Deputy Attorney General
Chief, Eastern Regional Office

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2734

JACK SHADIS, BELLE FEINBERG, MARIE BURTON, Individually and on behalf of all other persons similarly situated,

Appellees

v.

FRANK BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania,

WILBUR E. HOBBS, Individually and as Deputy Secretary of the Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

LEO A. SULLIVAN, Individually and as Welfare Policy Specialist, Office of Basic Family Maintenance, Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

DON JOSE STOVALL, Individually and as Executive Director of the Philadelphia County Board of Assistance,

HELEN HYDE, Individually and as Director of Operations, Philadelphia County Board of Assistance,

JUNE REED, Individually and as District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

CYNTHIA ANDERSON, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

MILDRED DAVIS, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

and

AURELIUS ROBERTSON, Individually and as Casework Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

WILLIAM HARDEN, JOHN GRADY,

Appellants

Appeal From the United States District Court
for the Eastern District of Pennsylvania—
Philadelphia

D.C. Civil No. 75-3421

Argued May 13, 1982

Before: Gibbons, Hunter, *Circuit Judges* and
Gerry,* *District Judge*

(Opinion filed July 20, 1982)

John O. J. Shellenberger (Argued)
Attorney for Appellants
Jerome J. Shestack (Argued)
Schnader, Harrison, Segal & Lewis
Susanna E. Lachs
Alan M. Lerner
Carolyn Lee Daffron
Cohen, Shapiro, Polisher,
Shiekman & Cohen
Attorneys for Appellees

OPINION OF THE COURT

Hunter, *Circuit Judge.*

1. This appeal raises the question of whether certain provisions of two contracts between the Pennsylvania

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

Department of Public Welfare ("PDPW") and the Pennsylvania Legal Services Center ("PLSC") and between PLSC and Community Legal Services ("CLS"), which prohibit CLS from requesting or accepting attorneys' fees in suits against the Commonwealth of Pennsylvania or Commonwealth employees, are void as contrary to public policy. Having been successful in their case-in-chief,[1] plaintiffs moved for an award of attorneys' fees to their counsel, CLS, pursuant to the Civil Rights Attorney Fees Awards Act, 42 U.S.C. §1988 ("the Fees Awards Act").[2] Appendix at 64a. An award was granted by Memorandum Order of the district court on August 17, 1981 in favor of CLS. Appendix at 330a. The court held that the relevant contractual provisions between CLS and the Commonwealth were void because they conflicted with the

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[1] Plaintiffs brought suit against the Commonwealth under the 1871 Civil Rights Act, 42 U.S.C. §1983. The litigation was commenced in 1975 as a class action by medically needy individuals who alleged an unlawful deprivation of certain medical benefits. Specifically, they requested injunctive and monetary relief because of: (1) violations of due process by the individual appellants in terminating Medicaid benefits without prior notice or opportunity for a hearing; and (2) operation of the Medicaid program under illegally low eligibility requirements. The plaintiffs essentially prevailed and a Stipulation of Settlement was executed on October 16, 1979. Appendix at 35a. This was approved by Order of the District Court on December 28, 1979. Appendix at 49a.

[2] Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

public policy underlying by the Fees Awards Act.[3] We agree and will affirm the order of the district court.

FACTS AND PROCEDURAL HISTORY

2. CLS is a non-profit legal services corporation the sole purpose of which is to provide legal services to the poor. It receives approximately half of its operating budget directly from the federal Legal Services Corporation under the National Legal Services Act, 42 U.S.C. §2996, *et seq.* The remaining half is received under Title XX of the Social Security Act, 42 U.S.C. §1397, *et seq.* Appendix at 107a-108a. Title XX funding is channelled from the United States Department of Health and Human Services to DPW. DPW then allocates a portion of the federal funds, together with a 25% matching state grant, to various community based legal services programs, including CLS. Appendix at 108a. The actual distribution and administration of Title XX monies for legal services is performed by the conduit organization, PLSC.

3. Pursuant to this funding arrangement, CLS entered into a series of annual contracts with PLSC for the fiscal years 1978-1981, during which CLS performed much of the work in the preparation of this case. The contracts for the fiscal periods 1979-1980 and 1980-1981 contained the provisions which prevent CLS from requesting attorneys' fees arising out of litigation against the Commonwealth or Commonwealth employees.[4]

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[3] The parties had agreed that if attorney's fees were permitted, a reasonable amount was $85,000. Appendix at 350a. Accordingly, judgment was entered in that amount by Order of September 9, 1981. Appendix at 349a.

[4] Specifically, the PLSC-CLS contract for the period October 1, 1979 to June 30, 1980 provided:

4. Before the no fees clause was inserted into the PLSC-CLS contract, DPW used other arguments in attempts to prevent CLS from obtaining fees when CLS attorneys successfully sued the Commonwealth. Beginning with fiscal year 1978-1979, DPW required, over the objections of PLSC and CLS, that DPW-PLSC funding contracts contain a no fees provision restricting the right of PLSC to receive attorneys' fees in cases against the Commonwealth. Since 1979, DPW has compelled PLSC to include a similar provision in its funding agreements with local legal services programs, including CLS. Appendix at 110a-111a.

The Department of Public Welfare requires inclusion of the following provision. Its inclusion and terms and subject to possible change, revision or other modification on the basis of objections by the Corporation:

> The [Legal Services Programs] and the Corporation shall not request attorneys' fees in any case brought against the Commonwealth or Commonwealth employees. In the event that any such attorneys' fees are awarded to the Corporation or LSPs, DPW will deduct the amount of fees so awarded from payment on the next invoice submitted by the Corporation. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

Appendix at 123a.

The subsequent contract for the period ending June 30, 1981 also provided:

> The [Legal Services Programs] may not accept attorneys' fees in any cases brought against the Commonwealth or Commonwealth employees. This provision is not applicable to costs imposed pursuant to Rule 37(e) of the Federal Rules of Civil Procedure.

Appendix at 156a.

5. The 1978-1979 contract between PLSC and DPW contained such a no fees provision. Although the 1978-1979 contract between PLSC and CLS did not contain a provision restricting the right to receive attorney's fees, the Commonwealth asserted the no fees provision of the PLSC/DPW contract as a defense to CLS's request for attorney's fees in *Bolden v. Pennsylvania State Police*, 491 F. Supp. 959 (E.D. Pa. 1980). The district court in that case held that the putative restriction was not effective because it lacked the approval and ratification of the PLSC Board of Directors. The Commonwealth did not appeal that ruling.

6. However, the Commonwealth again instituted no fees restraints. In August 1979, PLSC proposed a contract to CLS for the fiscal year 1979-80 which contained a no fees provision. Appendix at 113a. CLS signed and returned the proposed contract on January 11, 1980 with a letter objecting to the provision. Appendix at 147a.[5]

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[5] CLS' letter acknowledged that the question of the no fees restriction was *sub judice* and that its obligations under that provision were conditional on the court in *Bolden* holding CLS to be bound by the similar provision under challenge in that case. The fees issue also arose in Vecchione v. Wohlgemuth, 481 F. Supp. 776 (E.D. Pa. 1979) where CLS had been awarded attorneys' fees and costs against the Commonwealth. The Commonwealth paid CLS the *Vecchione* award in February, 1979. However, the Commonwealth attempted to subsequently reduce PLSC's statewide reimbursement by an equal amount. PLSC then had to reduce CLS' reimbursement by an approximately equal amount. When CLS instituted contempt proceedings against the Commonwealth before then District Judge Becker, the Commonwealth agreed to a Consent Order in which CLS would receive the fee award without suffering a like reduction in its reimbursements.

7. In 1980 DPW again stated that no funding would be forthcoming for any legal services program which did not acquiesce in DPW's demands by signing a contract containing the no fees provision. Appendix at 117a.

8. Shortly before the end of the fiscal year, DPW and PLSC entered into a contract for fiscal year 1980-1981, which again contained a no fees restraint. On June 30, 1980, CLS received from PLSC the proposed 1980-1981 contract, with a demand that the document be executed and returned no later than the following week. Appendix at 118a. On July 7, 1980, CLS officers, faced with many obligations to poor clients and a severe fiscal crisis, executed and returned the 1980-1981 contract to PLSC. Again, CLS attached a letter asserting that CLS did not, by executing the contract, waive its right to challenge the legality and enforceability of the no fees provision.[6] Appendix at 118a. CLS thus challenged the no fees provision in this case and its position was upheld by the district court. The Commonwealth has appealed.

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[6] Because we decide this case on the public policy issue, we need not address the appellees' contention that the 1980-81 contract was voidable as the product of economic duress. However, for the sake of factual completeness it is important to stress that DPW had insisted that it would not provide any 1980-81 funding for any social program which had not signed a contract which conformed to DPW demands (including the no fees provision). Appendix at 117a. On June 26, 1980, CLS unexpectedly suffered a $118,000 reduction in its Title XX reimbursements for expenses incurred during April and May of that year. Appendix at 116a. In June 1980, CLS was facing its second successive annual funding cut by the Commonwealth which had already resulted in service reductions and a 20% decrease in attorney staff. Appendix at 115a.

DISCUSSION

9. The threshold question in deciding this appeal is whether the district court properly concluded that this case presents a question of federal law, and not one of Pennsylvania of contract law. The district court was clearly correct. The underlying claim in this case is not based on contracts, but is a federal civil rights claim. Part of this claim is a request for attorneys' fees, made under a federal statute, to which a contract provision is raised as a defense. Therefore, the district court was correct in concluding that it is to federal law that it should turn for its rules of decision.[7]

10. Appellants argue that this court's decision in *Westmoreland Hospital Ass'n v. Blue Cross, et al.*, 605 F.2d 119, 123 (3d Cir. 1979), *cert denied*, 444 U.S. 1077 (1980), supports the proposition that the rules of Pennsylvania contract law control this case. We disagree. In *Westmoreland*, we held that certain insurance contract provisions deducting federal mental health staff grants from computation of hospitals' costs of operation were not void as contrary to public policy. The underlying claim in *Westmoreland* was based on contract and not, as here,

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[7] Of course, as the district court noted, the Pennsylvania law of illegal contracts may be instructive. Indeed, in Pennsylvania, as in almost all Anglo-American jurisdictions, contracts that are contrary to public policy, those which tend to be injurious to the public good, are illegal and void. In *Book's Estate*, 297 Pa. 543, 147 A. 608, 609 (Pa. 1929), the Supreme Court of Pennsylvania held that a contract is against public policy if it has "a tendency to injure the public or to be against the public good, or [is] inconsistent with good morals as to the consideration or the thing to be done." *See generally* 8 *Pennsylvania Law Encyclopedia*, §103.

on a federal statute. Furthermore, the district court in *Westmoreland* found no public policy that was contradictory to the contract provisions in question, and we agreed. 605 F.2d at 125. Because there was no conflict between the contracts and the alleged public policy, there was no controversy to resolve. Thus, we are not restrained by *Westmoreland*. The case before us is clearly at its roots a federal claim. Therefore, we now turn to the question of whether the contract provisions in question conflict with public policy.

Public Policy Underlying the Fees Awards Act

11. Having decided that federal law is controlling in this case, the district court held that the no fees restraints of the contracts between PLSC and CLS were unenforceable because they counteracted the federal public policy underlying the Fees Awards Act. The court utilized the analysis of the Restatement (Second) of Contracts §178 (1981).[8] After considering and balancing the factors in favor of enforcement of the contracts against the public policies weighing against enforcement, the court denied effect to the no fees provisions. The district court's conclusion and its approach were correct.

12. Congress enacted the Fees Awards Act to encourage private citizens to enforce fundamental rights under the civil rights laws.[9] Quite simply, the policy behind

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[8] The district court opinion cites §320 of the Restatement (Second) of Contracts (Tent. Draft No. 12, 1977). The tentative draft relied upon by the district court has now been officially adopted and promulgated by the American Law Institute in §178.

[9] The Fees Awards Act was passed in reaction to the Supreme Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In that case the Supreme

the Act is to encourage compliance with and enforcement of those laws. *Maher v. Gagne*, 448 U.S. 122 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979); *cert. denied*, 448 U.S. 906; *Skehan v. Bd. of Trustees*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979). *See also*, S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5910. Congress has noted that the primary goal of the Act is "to promote the enforcement of the Federal Civil Rights Acts, as Con-

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Court reversed a decision of the lower court awarding counsel fees to the plaintiffs on a "private attorney general" theory. The Court noted that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." 421 U.S. at 240. The "private attorney general theory" was explicitly endorsed by the legislature in enacting the Fees Awards Act. *See* S. Rep. 1011, *supra*, at 5909-11. The statute provided the bar with a greater incentive to pursue claims and was especially aimed at encouraging litigation in areas where only non-pecuniary relief was available. *See e.g.*, 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Kennedy):

> [T]here is [sic] often important principles to be gained in [civil rights] litigation, and rights to be conferred or enforced, but just as often no large promise of monetary recovery lies at the end of the tunnel. So civil rights cases—unlike tort or antitrust cases—do not provide the prevailing plaintiffs with a large recovery from which he can pay his lawyer.

See generally, Note, "Awards of Attorney's Fees to Legal Aid Offices," 87 *Harv. L. Rev.* 411 (1973); Malson, "In Response to Alyeska—The Civil Rights Attorney's Fees Awards Act of 1976." 21 *St. Louis U.L.J.* 430 (1976); Comment, "Attorney's Fees in Damage Actions Under the Civil Rights Attorney's Fees Awards Act of 1976." 47 *U. Chi. L. Rev.* 332 (1980); Note, "Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act. 89 *Col. L. Rev.* 346 (1980).

gress intended, and to achieve uniformity in those statutes and justice for all citizens." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 19 (1976). *See Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Courts have stated that the Act must be liberally construed to achieve these ends. *Mid-Hudson Legal Service, Inc. v. G. & U., Inc.*, 578 F.2d 34, 37 (2d Cir. 1978); *Dennis v. Chang*, 611 F.2d 1302, 1306 (9th Cir. 1980).

13. The district court in this case outlined clearly its view of the public policy involved:

> The public policy embodied in Section 1988 is a vital one. Congress could not have been clearer in its intent or in the seriousness it attached to the attorneys' fees provisions. The use of words such as 'essential' and 'integral' is prevalent in the legislative history and in the cases construing the Act. The policy is, quite clearly, an important one.

520 F. Supp. at 864. The court was referring, among other things, to the Senate Report's unambiguous statement of the policy behind the Act:

> Fee awards are an integral part of the remedies necessary to obtain such compliance [with the civil rights laws] . . . If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011 at 5913.

14. An important aspect of the enforcement scheme designed by Congress is the collection of attorneys' fees

from the states when states are losing defendants. It is clear that Congress contemplated that states and state officials would often be the targets of civil rights actions:

> [D]efendants in these [civil rights] cases are often state or local bodies of state or local officials. In such cases, it is intended that attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party).

S.R. No. 94-1011, *supra*, at 5913 (footnotes omitted).

15. In *Hutto v. Finney*, 437 U.S. 678, 694 (1977), the Supreme Court held that the Eleventh Amendment did not bar an award of attorneys' fees against a state. The Court noted:

> The [Awards] Act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunctive actions, indeed, the Act primarily applies to laws passed specifically to restrain state action. *See, e.g.*, 42 U.S.C. §1983. . . . The House Report is in accord: 'The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.' H.R. Rep. No. 94-1558, p. 7 (1976).

437 U.S. at 694.

16. It is well settled that Congress intended legal service programs, like private attorneys, to receive fees under the Fees Awards Act. Courts have awarded attor-

ney's fees without regard to plaintiffs' ability to pay for counsel or the availability of free legal counsel. *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980). In *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3d Cir. 1977), we stated:

> The statutory policies underlying the award of fees justify such shifting without regard to whether the individual plaintiff initially assumed the financial burdens of representation. . . . The award of fees to legal aid offices and other groups furnishing *pro bono publico* representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel. Legal services organizations often must ration their limited financial and manpower resources. Allowing them to recover fees enhances their capabilities to assist in the enforcement of congressionally favored individual rights. (Citations omitted.)

In *Dennis v. Chang*, the Ninth Circuit agreed that:

> [a]n award [where plaintiff has been represented without charge by a legal service organization] serves the purposes of the [Fees Awards] Act for two reasons: (1) the award encourages the legal services organization to expend its limited resources in litigation aimed at enforcing the civil rights statutes; and (2) the award encourages potential defendants to comply with civil rights statutes.

611 F.2d at 1306.

17. Thus, Legal Aid offices serve a private enforcement role and further the policies contemplated by Con-

gress in the Fees Awards Act. In *Rodriguez*, we discussed this role in more detail:

> . . . legal services organizations may win only modest cash awards or nonmonetized equitable relief for their clients. Despite the often insignificant potential monetary benefits in individual cases, legal services organizations render valuable services to their clients and their communities. *Legal aid organizations are often the sole representatives of the economically, socially and culturally deprived in their disputes with landlords, government welfare agencies, employers and creditors.*

569 F.2d at 1248 (emphasis added).

18. Fee incentives to legal aid offices are esential to enable legal services organizations to provide more than individual, routine legal services for poor litigants. To a great extent, legal services organizations must allocate limited resources among various possible clients.[10] Of necessity, the potential for fee recovery will be one of the factors considered in the allocation and use of resources

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[10] Commentators agree:

> Since the overburdened legal aid office cannot expand as the workload increases, given the level of its resources, and since pursuing a particular case in depth involves cutting back on time spent elsewhere, legal aid lawyers must continually balance costs and benefits of various time allocations . . . A possible award of attorney's fees may cause the legal aid office to change its allocation of services to some extent, and the funds derived from such awards may secure adequate representation for the office's other clients seeking relief under the same statute.

Note, Awards of Attorney's Fees to Legal Aid Offices, 8 *Harv. L. Rev.* 411, 414 (1973).

for the maximum benefit of the poor. We are not persuaded by the Commonwealth's contention that the contractual extraction of the financial incentives created by the Fees Awards Act will have no effect on CLS because it is "not free to pick its suits on the basis of pecuniary concerns." Appellants' Brief at 18.

19. Prior to the Supreme Court's decision in *Alyeska Pipeline*, federal courts had awarded attorneys' fees as an exercise of their traditional equitable powers. *See Hall v. Cole*, 412 U.S. 1, 4-5 (1973); *Mills v. Electric Auto Life Co.*, 396 U.S. 375, 392-93 (1970). By enacting the Fees Awards Act, Congress reinvested the judiciary with the discretion to grant attorneys' fees in civil rights cases. In this case, we conclude that the Commonwealth has attempted to vitiate, by contract, a significant portion of the power and duty which Congress has granted to the judiciary as an essential tool in the scheme of civil rights enforcement. It is axiomatic to our federal system that neither private parties nor the states can avoid the equitable powers of the federal courts. *Dodge v. Tulleys*, 144 U.S. 451, 457 (1882). Here, the existence of a contrary private agreement cannot successfully be asserted as a defense to the district court's statutorily mandated supervisory power over attorneys' fees.

20. If the Commonwealth could insert and enforce the no fees restraints in its contracts, the policy of economic inducement sought by Congress would be severely impaired. Legal service programs for the poor would have both less incentive and ability to bring civil rights suits against the Commonwealth. Thus, one of the most important types of private attorneys general would be significantly less willing to pursue civil rights litigation against the state. Judge Newcomer stated the issue aptly:

> Like any private lawyer, CLS must remain within a budget, and only do the legal work that it can afford to do. What the Commonwealth has attempted to do here is to buy immunity from CLS lawyers. In return for a steady partial subsidy, the Commonwealth has demanded that CLS not seek attorneys' fees in cases brought against the Commonwealth. *The obvious effect of this, if the agreement is enforced, is to cause CLS not to bring actions against the Commonwealth.* In end result, an important member of the plaintiffs' civil rights bar would be removed from the scene, and the vigorous enforcement of the laws would be materially quelled.

520 F. Supp. at 864 (emphasis added; footnotes and citations omitted). Congress expressed unambiguously the significance it attached to the attorneys' fees provisions, and we conclude that the public policy embodied in §1988 is a vital one.[11]

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[11] The importance of attorneys' fees in civil rights cases is also evidenced by the special standard to be used by district courts in deciding whether to grant such fees. Although it will be in the district court's discretion to decide whether a plaintiff is entitled to attorneys' fees under §1988:

> [a] party seeking to enforce the rights protected by the statutes covered by (§1988), if successful, should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust.

Staten v. Housing Authority of Pittsburgh, 638 F.2d 599, 604 (1980), *citing Skehan v. Bd. of Trustees*, 590 F.2d 470, 496 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); *citing* S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4, *reprinted in* (1976) U.S. Code Cong. & Admin. News, pp. 5908, 5912 (emphasis added). *See also Ross v. Horn*, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980); *Sethy v. Alameda County Water District*,

Public Policy in Favor of Enforcement

21. Appellants advance several arguments regarding public policy considerations in favor of enforcement of the contract provision which they contend outweigh the considerations outlined above. Although appellants' arguments have some merit, they do not outweigh the public policy embodied in the Fees Awards Act.

22. First, the Commonwealth argues that there is a public benefit in funding legal services programs with a fixed and known budget. This is true; but it misses the mark. Attorneys' fees awards to prevailing parties in civil rights litigation are not *part* of public funding to legal services programs. They are distinct payments of the cost of litigation in accordance with rights and responsibilities determined by Congress. The Commonwealth would have had the burden of paying fees under the Act for violations of civil rights had the litigants' counsel been private. The fact that the taxpayer may be the ultimate payor is not a reason for supporting the no fees restraints. *See Riddel v. National Democratic Party*, 624 F.2d at 545. In any event, it is equally plausible to argue that the taxpayer ultimately gains from the payment of attorneys' fees because civil rights litigation is generally recognized as benefiting the public as a whole.[12]

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602 F.2d 894 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979); *Bonner v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Mid-Hudson Legal Services, Inc. v. G & U, Inc.*, 578 F.2d 34 (2nd Cir. 1978); *Brown v. Culpepper*, 599 F.2d 274 (5th Cir. 1977).

[12] Indeed, one of the Congressional purposes supporting the fee-shifting provisions of the Fees Awards Act was to *save* taxpayers' funds by utilizing private attorney generals as a means of

23. Along similar lines, the Commonwealth argues that its funding of legal service programs is an effective substitute for the provisions of the Fees Awards Act. The Commonwealth contends that the state's funding scheme promotes civil rights litigation "more effectively than does the statute . . . [thereby rendering it] all but superfluous." Appellants' Brief at 16-17. Obviously funding of a legal services provision by the state furthers the goal of representation of the indigent. However, that basic level of funding provided in the annual grant is not enough to provide incentives to undertake representation in the specific types of civil rights litigation which Congress hoped to encourage. The case at bar is a prime example of the kind of litigation that Congress intended to encourage through the Fees Awards Act. Here, the district court granted injunctive and declaratory relief to two plaintiff classes. The classes comprised, in the first class, recipients of and, in the second class, applicants for, medical assistance to the medically needy. The first class, succeeded in proving that the state program conflicted with federal regulations. The second class succeeded in showing that medical assistance benefits had been unconstitutionally terminated. *Shadis, et al. v. Beal, et al.*, Civil Action No. 75-3421 (E.D. Pa. August 10, 1976) (order granting declaratory and injunctive relief on liability issues.) The Commonwealth's argument that its grant to CLS of the minimum amount of money required of it in order to obtain federal funding benefits the poor more than the potential of attorneys' fees awards is disingenuous. The case at bar proves the contrary. Advanced funding does not serve as an inducement

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"limiting the growth of the enforcement bureaucracy." *See* S. Rep. No. 94-1011 at 5911.

to the State to comply with civil rights laws. The prospect of having to pay attorneys' fees does provide such an incentive. Indeed, the state may also have an incentive to settle a case early. *See Dennis v. Chang*, 611 F.2d at 1307.

24. The Commonwealth slightly rephrases the contention by arguing that it does not want to "pay legal fees twice." Appellants' Brief at 17. This rhetorical ploy avoids the issue. The Commonwealth does not pay "twice" when it violates someone's civil rights and is then forced to pay attorneys' fees. It pays only once—as a violator of civil rights. Its role as a provider of public services is distinct from its role as a defendant in a civil rights case and has no bearing on the question of reimbursing individual citizens for individual wrong brought upon them.[13]

Use of the Restatement of Contracts Standard

25. In balancing the policy considerations in connection the contractual fee restraints, the district court used the approach presented in Section 178 and 179 of the *Restatement (Second) of Contracts* (1979). Section 178 provides:

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[13] The Ninth Circuit rejected an argument similar to the Commonwealth's in Dennis v. Chang:

> The remaining argument is that 'double payment' is somehow 'unfair.' Since awards of attorneys' fees to state funded legal services organizations in civil rights litigation against the state are encompassed within the statutory language of the Fees Awards Act, were in all probability contemplated by Congress, and serve the purpose for which the Act was adopted, the question of fairness has been resolved by Congress.

611 F.2d at 1307.

> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against enforcement of such terms.[14]

28. The Commonwealth argues that the district court's application of the Restatement's formulation was incorrect because it failed to require that the legislation in question either "expressly prohibit[s] the contract or . . . require[s] a performance or a result that directly contradicts what the contract requires." Appellants' Brief at 10-11. Neither federal nor Pennsylvania law requires such a direct, explicit conflict. Such a requirement would require that a contract be "illegal" in a literal sense before it could be invalid. However, the scope of the public

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[14] Section 178 continues:

(2) In weighing the interest in the enforcement of a term, account is taken of

(a) the parties' justified expectations;

(b) any forfeiture that would result if enforcement were denied; and

(c) any special public interest in the enforcement of a particular term.

(3) In weighing a public policy against enforcement of a term, account is taken of

(a) the strength of that policy as manifested by legislation or judicial decisions;

(b) the likelihood that a refusal to enforce the term will further that policy;

(c) the seriousness of any misconduct involved and the extent to which it was deliberate; and

(d) the directness of the connection between that misconduct and the term.

policy doctrine is broader and more encompassing than the concept of illegality.[15]

29. Section 179 of the Restatement provides that public policy against "the enforcement of promises or other terms may be derived by the court from: "(a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare . . ." The Restatement obviously does not require that the legislation in question expressly prohibit or require an act inconsistent with the contract; it is sufficient if the legislature makes an adequate declaration of public policy which is inconsistent with the contract's terms. For example, the Restatement notes:

> The legislation is significant, not as controlling the disposition of the case, but as enlightening the court concerning some specific policy to which it is relevant. A court will examine the particular statute in the light of the whole legislative scheme. . . . It will look to the purpose and history of the statute.

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[15] The decisional law of Pennsylvania is consistent with this position. In Central Dauphin School District v. American Casualty Co., 493 Pa. 254, 426 A.2d 94 (1981), the Supreme Court of Pennsylvania endorsed the approach of the Restatement (Second) of Contracts. Many years prior to *Central Dauphin* that same court stated that a contract which is injurious to the public interest may be held void even in the absence of express legislative mandates contrary to the provisions of the agreement. Kuhn v. Buhl, 251 Pa. 348, 370, 96 A. 977 (1916). Sections 178 and 179 represent an accurate reflection of the law regarding the public policy contractual defense. *See, e.g., Jackson Purchase Rural Electric Cooperative Association v. Local Union 816, IBEW*, 646 F.2d 264 (6th Cir. 1981); *California Pacific Bank v. Small Business Administration*, 557 F.2d 218 (9th Cir. 1977).

Comment (b) to Section 179. *See generally* 6A A. Corbin *Corbin on Contracts* §1375 (1962).

30. The Commonwealth primarily relied on *Westmoreland Hospital,* in which we held that certain cost-reimbursement contracts were not illegal or contrary to public policy. However, as noted *supra,* this court's holding in that case was predicated in part on the absence of a contrary public policy in the relevant legislation, and administrative regulations. 605 F.2d at 125. Here, there is such a contrary public policy, the impact of which the state has attempted to avoid.

CONCLUSION

31. For the foregoing reasons, we rule that the no fees provisions of the contracts between CLS and PLSC are void as contrary to public policy . The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-2734

JACK SHADIS, BELLE FEINBERG, MARIE BURTON, Individually and on behalf of all other persons similarly situated,

Appellees

v.

FRANK BEAL, Individually and as Secretary of the Department of Public Welfare, Commonwealth of Pennsylvania,

WILBUR E. HOBBS, Individually and as Deputy Secretary of the Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

LEO A. SULLIVAN, Individually and as Welfare Policy Specialist, Office of Basic Family Maintenance, Department of Public Welfare, Southeastern Region, Commonwealth of Pennsylvania,

DON JOSE STOVALL, Individually and as Executive Director of the Philadelphia County Board of Assistance,

HELEN HYDE, Individually and as Director of Operations, Philadelphia County Board of Assistance,

JUNE REED, Individually and as District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

CYNTHIA ANDERSON, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

MILDRED DAVIS, Individually and as Assistant District Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

and

AURELIUS ROBERTSON, Individually and as Casework Supervisor, Medical Assistance District Office, Philadelphia County Board of Assistance,

WILLIAM HARDEN, JOHN GRADY,

Appellants

(D.C. Civil No. 75-3421)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PRESENT: GIBBONS and HUNTER, *Circuit Judges;* and GERRY, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on May 13, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 9, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST: /s/ Sally Mrvos
Clerk

July 20, 1982

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-3421

JACK SHADIS, ET AL

v.

FRANK S. BEAL, ET AL

MEMORANDUM AND ORDER

NEWCOMER, J., August 17, 1981.

Plaintiffs, as the prevailing party in this case move for an award of attorneys' fees to their attorney, Community Legal Services ("CLS"). Defendants argue that CLS is barred from accepting any such award.

The *Shadis* litigation was a class action brought against several Commonwealth employees on behalf of indigent persons who allegedly were deprived of certain medical benefits to which they were entitled under a Medical Assistance program funded and administered by the Commonwealth.

CLS and other legal services programs ("LSP") acquire funds under the joint federal state title XX program through the Pennsylvania Legal Services Center ("PLSC"), a nonprofit corporation formed by the Commonwealth.

Pursuant to this funding arrangement, CLS entered into a series of annual contracts with PLSC for the fiscal years 1978-1981, during which CLS performed much of the work in preparation of this case. The contracts for the fiscal periods 1979-1980 and 1980-1981 contain provisions which allegedly prevent CLS from requesting attorneys' fees arising out of litigation against the Commonwealth or Commonwealth employees.

Defendants initially argue that the CLS-PLSC funding contracts for 1979-1981 prevent CLS from requesting attorneys' fees generated in the fiscal year 1978-1979 because CLS did not file its request for fees until July, 1980. Defendants argue that the primary funding contract for 1979-80 between PLSC and its funding source, the Commonwealth Department of Public Welfare contains language to the effect that the LSP, including CLS, "may not accept attorneys' fees in any cases brought against the Commonwealth." Regardless of the validity of such a provision and its power to bind CLS, it does not exclude fees for work done before the contracts went into effect. Moreover, the Court does not find the cases cited by defendant concerning the applicability of changes in statutory laws helpful to its consideration of the contract issues here. The Court finds that the funding contracts between PLSC and DPW and between PLSC and CLS for each of the three fiscal periods pertain only to fees generated by CLS in each of those periods.

1. *The 1978-1979 Contract: Collateral Estoppel and Res Judicata*

Defendants argue that CLS is precluded by a contract between DPW and PLSC from requesting legal fees gen-

erated during the fiscal year 1978-1979. That contract provided in pertinent part that "the LSPs and the corporation [PLSC] shall not request attorneys' fees in any case against the Commonwealth or Commonwealth employees." Precisely the issue of whether this contract prevents CLS from requesting legal fees for work done in 1978-1979 in a case against the Commonwealth or its employees was before Judge Green in *Bolden v. Pa. State Police*, 491 F. Supp. 958 (E.D. Pa. 1980).

The *Bolden* case was a class action in which plaintiffs alleged racial discrimination in the hiring and promotion practices of the Pennsylvania State Police. The parties agreed to the entry of a consent decree, later modified by the court, which substantially gave the plaintiff class the relief it sought. CLS, attorney for the class, moved for an award of attorneys' fees. Judge Green held that because CLS was not a signatory to the 1978-1979 PLSC-DPW contract and because the provision in question was not ratified by the PLSC board of directors as required, the DPW-PLSC contract did not bar CLS from requesting attorneys' fees for work done in the fiscal year 1978-1979.

Plaintiffs contend that, in light of the *Bolden* holding, defendant is barred from asserting the 1978-1979 DPW-PLSC contract provision as a defense by the doctrine of res judicata. Defendants, on the other hand, take the position that the doctrine of collateral estoppel rather than res judicata applies. Defendants argue that since, under the facts here, plaintiffs are urging an "offensive" collateral estoppel, the applicability of the *Bolden* court's holding to the contract defense raised in *Shadis* is to be evaluated according to the criteria set forth in *Parklane Hosiery*

Co. v. Shore, 439 U.S. 322, 326 (1979).[1] This Court finds that defendants are collaterally estopped from asserting the contract as a defense. It is, therefore, unnecessary to determine whether res judicata applies.[2]

In the *Parklane* case, the Supreme Court decided "not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Parklane*, 493 U.S. 322, 331. The Court then provided the following guidelines for trial courts: "The general rule should be that in cases where a plaintiff could easily have joined in an earlier action or where . . . the application of offensive estoppel would be

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[1] An offensive use of "collateral estoppel occurs when the plaintiff seeks to foreclose defendant from litigating an issue defendant has previously litigated unsuccessfully in an action with another party." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 4 (1979).

[2] If plaintiffs' motions for attorneys' fees in *Shadis* and *Bolden* are considered rights of action separate from plaintiffs' original class action claims, then these rights of action are identical. Under this view, the *Bolden* court's adjudication of a cause of action identical to that in *Shadis* and the identity of the parties to the motions (CLS and two agencies privy to the Commonwealth), *see generally* 1B Moore's Federal Practice ¶.411 (2d ed. 1974), are sufficient to permit plaintiffs to invoke the doctrine of res judicata to bar defendants' contract defense in *Shadis*. Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955). If the request for attorneys' fees is not separable from the original cause of action, then by virtue of the non-identity of the original causes of action in *Shadis* and *Bolden*, defendants' contract defense in *Shadis* is not res judicata. Cromwell v. County of Sac, 94 U.S. 351, 352 (1877). However, defendants may still be barred from raising the contract defense by the doctrine of collateral estoppel, which does not require that the causes of action be identical. *Cromwell*, 94 U.S. 351 at 352.

unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Parklane*, 493 U.S. at 331.

The *Parklane* Court's concern regarding the offensive use of collateral estoppel stemmed from an interest in judicial economy and the potential unfairness to a defendant whose position on an issue is precluded by a prior judgment involving that defendant or a party privy and a different plaintiff. None of the Supreme Court's objectives is compromised by application of the doctrine in this case. The Commonwealth had the same opportunities in *Bolden* to make its case as it does in *Shadis*. The Commonwealth should have known when it had the opportunity fully and fairly to litigate the issue in *Bolden* that CLS would seek attorneys' fees from it for 1978-1979 in connection with other law suits. Finally, and importantly, judicial economy would not be served by relitigating the 1978-1979 contract issue before this court.

Defendants also contend that collateral estoppel should not apply because they are not identical parties to or in privy with, the defendants in *Bolden*. The Court finds, however, that the defendants in *Shadis* and *Bolden* are aligned such that collateral estoppel may apply. In both cases, defendants were agencies or individuals employed by agencies of the Commonwealth. The Commonwealth is surely interested in the outcome of all litigation involving its various agencies. The privity between the Commonwealth and its agencies, the State Police, and the DPW, is sufficient to extend the estoppel by judgment to the Commonwealth. *Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 618 (1926).

The Court therefore concludes, for the reasons stated above, that defendant is precluded from raising the 1978-1979 PLSC-DPW contract as a defense to plaintiffs' request for attorneys' fees for work done in that fiscal year.

Finally, although this Court concludes that collateral estoppel bars the contractual defense raised by defendant, the Court is persuaded by the reasoning of Judge Green's opinion in *Bolden*, and would be inclined to follow *Bolden* if defendants were not estopped in this case.

2. *The 1979-1980, 1980-1981 Contracts: Public Policy*

Plaintiffs argue that the contractual term to which they were forced to agree should be found unenforceable because it is void as contrary to public policy.

In determining which rules of law to apply in deciding this issue, the Court notes that the Court of Appeals for this Circuit has suggested in a case treating similar issues that the rules of contract law in the Commonwealth of Pennsylvania should apply. *Westmoreland Hospital Ass'n. v. Blue Cross, et al.*, 605 F.2d 119, 123 (3d Cir. 1979) *cert. denied*, 444 U.S. 1077 (1980). (Insurance contract provisions deducting federal mental health staff grants from computation of hospitals' costs of operation not void as contrary to public policy). *Westmoreland* does not, however, necessarily govern this case. In the first place, the district court in *Westmoreland* found no public policy that was contradictory to the effect or purpose of the contracts, and the Court of Appeals adopted its analysis, *Westmoreland*, 605 F.2d at 125. Having not found any conflict between the contracts and the alleged public policy, the issues of resolving that conflict were never actually reached. In the second place, the fundamental claim in this case is

not based on contract, as was the claim in *Westmoreland*. Instead, this is a federal civil rights claim, a part of which is a claim for attorneys' fees, to which a contract is raised as a defense.

Having concluded that it is not bound by any inference that might be drawn from *Westmoreland*, the Court further concludes that it is to federal law that it must turn for the rules of decision. Of course, this is in part a contracts question, and the Pennsylvania law of contracts would seem germane, but more fundamentally it is an issue of federal question litigation, federally guaranteed rights, and a federal policy of inducing lawyers to bring actions such as this one. This is not at its root a contracts claim, but rather a fees request to which defendants have raised a contracts defense. Therefore, although the Pennsylvania law of "illegal" contracts may be instructive, the Court concludes that it is an issue of federal law that it must now decide.

As a general rule, courts will not enforce contractual provisions that are illegal, and illegal in this sense has been defined as "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy." Restatement of Contracts §512 (1932) *quoted in Contractor Industries v. Zerr*, 241 Pa. Super. 92, 97, 359 A.2d 803, 805 (1976). In this case, however, the Court is not presented with a contract that is illegal in the narrow sense; that is, the contract is not prohibited by any express rule of law. Instead, the contract here seems to function in such a way as to counteract through economic duress an important public policy that is carried out through economic inducement. No case cited to the Court, or uncovered through this Court's research, treats this kind of "contrariness" to public policy. The Restatement of Contracts, however, provides a useful list of considerations. Section 320 of Re-

statement (Second) of Contracts (Tent. Draft No. 12, 1977) reads as follows:

> WHEN A TERM IS UNENFORCEABLE ON GROUNDS OF PUBLIC POLICY.
>
> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or if the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations,
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> (a) the strength of that policy as manifested by legislation or judicial decisions,
>
> (b) the likelihood that a refusal to enforce the term will further that policy,
>
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
>
> (d) the directness of the connection between that misconduct and the term.

Pennsylvania law is not to the contrary. In *Kuhn v. Buhl*, 251 Pa. 348 (1916), the Pennsylvania Supreme Court quoted certain legal authorities approvingly.

[T]he relevant applicable principles are well stated in the following excerpts from the authorities: 'Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal though in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result: 15 A.M. & Eng. Encyc. of Law (2d Ed.), 934. In other words, its validity is determined by its general tendency at the time it is made, and if this is opposed to the interests of the public it will be invalid, even though the intent of the parties was good and no injury to the public would result in the particular case. The test is the evil tendency of the contract and not its actual injury to the public in a particular instance: 9 Cyc. 481-2. In the absence of any legislative prohibition of a particular agreement which may be brought before a court, the latter, to declare it void on this ground, must find that such contracts have a tendency to injure the public—are against public good, or inconsistent with sound policy and good morals as to the consideration or thing to be done: 9 Cyc. 482. Whether a contract is against public policy is a question of law for the court to determine from all of the circumstances in each case. It is clearly to the interest of the public that persons should not be unnecessarily restricted in their freedom to make their own contracts and agreements, therefore they are not to be held void as being contrary to public policy unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way. On the other hand the interests of the public do require that there shall be some restrictions on the freedom of persons to enter

> into contracts; and if an agreement binds a party to do or not to do anything the doing or omission of which is manifestly injurious to the public interests, the courts must declare it contrary to public policy, and therefore illegal and void: 9 Cyc. 483-5.

Kuhn v. Buhl, 251 Pa. 348, 369-70 (1916).[3]

The public policy underlying the Civil Rights Attorneys' Fees Awards Act has been discussed at length elsewhere.[4] Certainly, the legislative history of §1988 is clear and unambiguous as to the federal policy envisioned by the drafters. *See Custom v. Quern*, 482 F. Supp. 1000, 1003 (N.D. Ill. 1980). The statute was enacted to prompt the vigorous enforcement of the civil rights laws, "and to achieve uniformity in those statutes and justice for all citizens." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 19 (1976). The Senate Committee on the Judiciary found the awarding of attorneys' fees to be "essential" to the full enforcement of the federal civil rights laws, and "an integral part of the remedies necessary to obtain . . . compliance" with those laws. S.Rep. No. 94-1011, 94th Cong., 2nd Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913.

An important part of the enforcement scheme designed by Congress is the collection of attorneys' fees from the states when states are the losing defendants. Explicit in this element is Congress's realization that states and state officials are very often the targets of civil rights actions.

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[3] The issue of what remains if a contract term is found to be void is discussed below.

[4] *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978), Riddell v. Nat'l Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980); Dennis v. Chang, 611 F.2d 1302, 1306 (9th Cir. 1980); Custom v. Quern, 482 F. Supp. 1000, 1004 (N.D. Ill. 1980).

> [D]efendants in these cases are often state or local bodies or state local officials. In such cases, it is intended that attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

Senate Report No. 94-1011, 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913, (footnotes omitted).

The attorneys' fees scheme was a time-tested method by 1976 when the Civil Rights Attorneys' Fees Award Act was enacted and Congress was familiar with the method by which its policy would be carried out. As the Senate Committee on the Judiciary recognized, "[t]he idea of the 'private attorney general' is not a new one. . . . We have, since 1870, authorized fee shifting under more than 50 laws." Senate Report No. 94-1011 at 3. Congress expected that private lawyers who might otherwise refuse to represent indigent clients with meritorious civil rights claims would be induced to take those cases by the prospect of substantial fee awards made to prevailing plaintiffs. The success of the scheme in this regard is clear beyond dispute.

It is also clear beyond dispute that legal aid societies are entitled to attorneys' fees, and that the case here may be characterized as precisely the kind of litigation that Congress intended to encourage through the Civil Rights Attorneys' Fees Act. In this case, the Court granted injunctive and declaratory relief to two plaintiff classes. The classes comprised, in the first class, recipients and, in the second class, applicants for medical assistance to the medically needy. The first class succeeded in proving that the

state program conflicted with federal regulations. The second class succeeded in showing that medical assistance benefits were unconstitutionally terminated. *Shadis, et al. v. Beal, et al.*, Civil Action No. 75-3421 (E.D. Pa. August 10, 1976) (Order granting declaratory and injunctive relief on liability issues.)[5]

In asserting its contractual defense, the Commonwealth argues that it should be permitted to erect a compensation system for CLS apart from the national scheme created by Congress. It states, "The contracts between the Commonwealth, PLSC and CLS have met the interests of the Act and in a way that is probably more useful to low income persons and legal aid agencies than sole reliance on the act. The Commonwealth has given the agencies funds in advance. . . ." Defendants' Supplementary Brief in Opposition to Plaintiffs' Motion for Attorneys' Fees at 7. The Court disagrees with the contention that the contracts here "have met the interests of the Act."

It is quite clear, and courts have recognized, that CLS, in "rationing" its resources must take into account the likelihood of obtaining attorneys' fees.[6] Like any private lawyer, CLS must remain within a budget, and only do the legal work that it can afford to do. What the Commonwealth has attempted to do here is to buy immunity from CLS lawyers. In return for a steady partial subsidy, the Commonwealth has demanded[7] that CLS not seek attor-

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[5] The damages claims were subsequently settled. Shadis v. Beal, Civil Action No. 75-3421 (E.D. Pa. December 28, 1979) (Order approving settlement of damages claims).

[6] *E.g.*, Rodriquez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977).

[7] "Demanded" is accurate usage. CLS protested from the first year in which the contract term was proposed that the bar

neys' fees awards in cases brought against the Commonwealth. The obvious effect of this, if the agreement is enforced, is to cause CLS not to bring actions against the Commonwealth. In end result, an important member of the plaintiffs' civil rights bar would be removed from the scene, and the vigorous enforcement of the civil rights laws would be materially quelled. *Dennis v. Chang*, 611 F.2d 1302, 1306-7 (9th Cir. 1980).

The situation is exacerbated by the nature of particular defendants in this case. This Court has serious doubts that any contractual term immunizing a defendant from the Civil Rights Attorneys' Fees Awards Act provisions would be enforceable,[8] but here, where awards in cases brought against this particular class of defendants are specifically intended by Congress, the contradiction of public policy by the contract is palpable. The Court must include that factor in assessing the conflict between the Act and the contractual term. This is not just a random, individual defendant who has opted out of the rational scheme; this defendant is among the most significant targets of the lawsuits Congress meant to encourage. In short, Congress has made a clear and unambiguous statement that a certain kind of lawsuit is to be encouraged. This lawsuit is of that kind.

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to seeking attorneys' fees was improper and contrary to public policy.

[8] Contracting not to accept fee awards against an entity or person damages Congress' national policy when any lawyer does it, because it creates an inducement, however subtle, not to bring actions against that putative defendant. The critical element is that the agreement is a prior restraint on the lawyer's decision-making. If such agreements were enforceable, the entity or person could programmatically require such agreements from any number of lawyers with whom it deals, thus diminishing the scope and vitality of the inducement Congress wished to create.

The Court finds that the contractual term relied upon by the Commonwealth operates to diminish the likelihood of this kind of lawsuit being brought. The enforcement of this contractual term is therefore contrary to public policy. The only remaining issue to be resolved is whether the term should therefore be considered void.

In weighing the interest in the enforcement of the term against the public policy against enforcement of a term, the Court observes that the public policy embodied in Section 1988 is a vital one. Congress could not have been clearer in its intent or in the seriousness it attached to the attorneys' fees provisions. The use of words such as "essential" and "integral" is prevalent in the legislative history and in the cases construing the act. The policy is, quite clearly, an important one. By contrast, the Court has difficulty in ascribing much importance to the enforcement of the contract. The three factors listed in the Restatement under "weighing the interest in the enforcement of a term," *see* Restatement (2d) of Contracts (Tent. Draft No. 12 1977) §320, give little support to the Commonwealth's position. The parties' expectations were divergent,[9] and the Court can perceive neither "forfeiture" if enforcement were derived,[10] nor "any special public interest in the enforcement" of the term.[11]

The Commonwealth may legally decide to reduce its funding of CLS. This was Hawaii's response, *see Dennis v. Chang*, 611 F.2d 1302, 1307 n. 15 (9th Cir. 1980). It may decide to stop funding CLS altogether. What it may not do is contract with CLS in such a way that CLS will be

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[9] Restatement (2d) Contracts (1977) §320(2)(a).

[10] *Id.* §320(2)(b).

[11] *Id.* §320(2)(c).

deterred from bringing civil rights cases against it. For that reason, the Court will decline to enforce the agreement that purports to bar an award of attorneys' fees to CLS.

The Commonwealth argues that this conclusion by the Court renders the entire funding contract void. The cases cited by the Commonwealth, *City of Pittsburgh v. Goshorn*, 230 Pa. 212 (1910) and *Dippel v. Brunozzi*, 365 Pa. 264 (1950) do not support that broad contention.[12] In addition, the Restatement explicitly refers to a "term" of an agreement. However, the Court need not rule on the issue of what remains of the CLS contract because the only issue before it is the adequacy of the defense to the attorneys' fees request.

The parties have informed the Court informally that a partial settlement has been reached, and that they have agreed on the value of the services rendered to the class by CLS. The Court will order that the parties file a stipulation to that effect and judgment will be entered on the stipulated award.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

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[12] The cases do not address for example, the issue of divisibility. *Cf.* Sidco Paper Co. v. Aaron, 465 Pa. 586 (1976).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-3421

JACK SHADIS, ET AL.

v.

FRANK S. BEAL, ET AL.

ORDER

AND NOW, this 17th day of August, 1981, it is hereby ORDERED that Plaintiffs' Motion for an Award of Attorneys' Fees is GRANTED.

The parties shall file a stipulation as to the amount previously agreed upon.

AND IT IS SO ORDERED.

(s) Clarence C. Newcomer
Clarence C. Newcomer, J.

Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-385

IN THE

Supreme Court of the United States

October Term, 1982

HELEN B. O'BANNON, et al.,
Petitioners

v.

JACK SHADIS, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the trial court abuse its discretion by awarding attorney's fees to legal service program lawyers in a civil rights case and declining to enforce a provision in that program's funding contract which prohibited it from exercising its federal statutory right to seek a judicial award of fees in civil rights cases brought against the State?

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COUNTERSTATEMENT OF THE CASE

This case stems from efforts of the Department of Public Welfare of Pennsylvania ("DPW") to impose contractual provisions which would prevent Community Legal Services, Inc. ("CLS") from obtaining fees where CLS attorneys have successfully represented clients in civil rights litigation against the Commonwealth.

Beginning with fiscal year 1978-79, DPW has insisted, over the continuous objections of CLS and its conduit funding organization, Pennsylvania Legal Services Center ("PLSC"), that funding contracts with PLSC contain a provision restricting the rights to request or receive attorneys' fees in cases against the Commonwealth and its employees. DPW has compelled PLSC to include similar provisions in its funding agreements with local legal service programs, including CLS. (Pet. App. at 6a).

The proposed 1979-80 funding contract contained such a fee restraint. CLS returned that contract to PLSC together with a letter objecting to the fee restraint and making CLS' obligations under the anti-fee provision conditional on the court holding CLS to be bound by a similar provision then being challenged in *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E. D. Pa. 1980) (Green, J.) (Pet. App. at 7a & n.5). The fee restraint in the 1979-80 contract never became effective because the district court in *Bolden* held that the similar fee restraint was not effective and the Commonwealth did not appeal.

In 1980 DPW again insisted that no funding would be forthcoming for any legal services program which did not sign a contract containing the fee restraints. (Pet.

App. at 8a).[1] CLS officers, faced with obligations of professional responsibility to poor clients and confronted with the imminent threat of CLS' fiscal death, signed the 1980-81 proposed contract but reserved its right to challenge the fee restraint.[2] (Pet. App. at 8a).

CLS did challenge the fee restraint and was upheld by the district court and affirmed by the court of appeals. The Commonwealth now seeks review by this Court.

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1. Contemporaneously with this struggle over fees, the Commonwealth also subjected CLS to serious cutbacks in appropriations. (Pet. App. at 8a, n. 6).

2. More recently, the General Assembly of Pennsylvania inserted a provision in the General Appropriations Act for 1981-82, Act No. 81-5A, which, if given effect, will reduce the Commonwealth's appropriations to legal services dollar-for-dollar with any award of attorney's fees against any Commonwealth agency or official and in favor of a legal service provider. CLS believes this statute is invalid on several grounds including an impermissible conflict with federal law and policy. CLS has filed a petition to intervene in *Commonwealth v. Pennsylvania Legal Services Center*, No. 82-0148 (M. D. Pa.), and intends to challenge the appropriations bill in that case, if intervention is permitted.

ARGUMENT

There are at least four persuasive reasons why the lower courts' invalidation of a contract clause inserted in CLS' funding contracts by the Commonwealth to restrict fee awards to CLS lawyers does not merit further review.

First, the conflict found by the courts below between the contractual fee restraints and the policies underlying the Fees Awards Act results from a simple application of accepted principles and is not contrary to any holding of this Court or of any federal courts of appeals. *Second*, the holding below is so narrow that it is unlikely to extend beyond the parties involved. *Third*, a grant of certiorari in this case would be pointless because the Commonwealth now seeks its original objective through statute rather than by contract and another case to test that issue is now pending, *Commonwealth v. Pennsylvania Legal Services Center*, No. 82-0148 (M. D. Pa. 1981). *Fourth*, even if Petitioners are successful on the issue presented to this Court there are additional independent factual and legal grounds for the decision below.

Only a brief amplification of these points is warranted.

I. The Standard of Unenforceability Adopted by the Courts Below Is Correct and Is Not in Conflict With Any Decision of This Court or Any Federal Court of Appeals.

The courts below held that the fee restraints in the Commonwealth's funding contracts counteracted the frequently enunciated public policies underlying the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C.

§ 1988 (the "Fees Awards Act"). This result was reached by balancing the factors favoring enforcement of the contracts and the compelling public policies against it. This is the approach found in Section 178 of *Restatement (Second) of Contracts* (1981), a sound and scholarly approach which has been applied by the courts of appeals of other circuits. *See Jackson Purchase Rural Electric Cooperative Ass'n. v. Local 816, IBEW*, 646 F. 2d 264, 267 (6th Cir. 1981); *California Pacific Bank v. Small Business Administration*, 557 F. 2d 218, 224 (9th Cir. 1977). Indeed, no federal court has rejected, or even questioned, the Restatement's standard.

Petitioners, however, argue for a standard which limits the doctrine of unenforceability to situations in which "the contractual terms were directly and expressly prohibited by statute" (Pet. at 9).[3] But such a narrow and novel standard is contrary to the express provisions of the Restatement,[4] and fails to appreciate that public policy may derive from legislative sources even where the statute does not expressly prohibit the provision in question. As noted in the Restatement's Commentary:

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3. In effect, Petitioners suggest a standard that would limit the doctrine of unenforceability to contracts which are "illegal" in the literal sense. *Jackson Purchase, supra,* and *California Pacific Bank, supra,* fail to support the standard asserted by Petitioners since neither decision required an express statutory prohibition as a condition to a finding of unenforceability.

4. Section 178 of the Restatement (Second) of Contracts provides:

> (1) A promise or other term of an agreement is unenforceable on ground of public policy if legislation provides that it is unenforceable *or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.* (Emphasis added).

> The legislation is significant, not as controlling the disposition of the case, but as enlightening the court concerning some specific policy to which it is relevant. A court will examine the particular statute in the light of the whole legislative scheme . . . It will look to the purpose and history of the statute. Comment b to Section 179.

This is precisely what the courts below did.

Unable to mount a serious challenge to the Restatement's standard, Petitioners seek comfort in *D. H. Overmyer Co. v. Frick Co.*, 405 U. S. 174 (1972). There, the Court held that a "cognovit" clause could be enforced against a corporate debtor without violating the Due Process Clause of the Fifth Amendment. From this, Petitioners contend that one who can waive constitutional rights must necessarily be permitted to waive any lesser rights. But that reasoning hardly compels a federal court to enforce a contractual provision designed to eliminate judicial authority to administer fee awards in civil rights cases.

Moreover, Petitioner's reliance upon "waiver" simplistically ignores the plain fact that the Fees Award Act embodies public policies having impact far beyond the lawyers who seek an award of fees. Courts have long refused to enforce an attempted relinquishment of statutory rights enacted for the benefit of the public as a whole where the purported waiver has negative impact beyond the contracting parties. *See Fox Midwest Theatres v. Means*, 221 F. 2d 173, 180 (8th Cir. 1955); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F. 2d 885, 896 n. 27 (3d Cir. 1975). Similarly, courts have often declined to allow one to waive the benefit of a statute

which was enacted for the protection of a class to which he belongs. *See, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 740 (1981). Here, it is not disputed that the Fees Awards Act was enacted for the benefit of all citizens to encourage active litigation of civil rights. *See* Note, *The Civil Rights Attorney's Fees Awards Act of 1976: A View From the Second Circuit*, 29 Buffalo L. Rev. 559 & n. 3 (1980).[5] Such litigation vindicates significant Congressional policies, not only for the individual plaintiff, but also for others similarly situated. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401-02 (1968).

Petitioners next argue that the contractual fee restraints did not violate public policy because fee awards under the Fees Awards Act are discretionary. Of course the Fees Awards Act invests discretion in the federal courts. But it does not follow, as Petitioners assume, that State officials can override that discretion by a contractual clause which abrogates the opportunity to seek fees, interferes with the equitable power of the judiciary under the Fees Awards Act, and eliminates a Congressionally created incentive to further enforcement of the civil rights laws.

Petitioners assert a public interest in funding legal service programs with a known budget. As the court of

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5. A prospective waiver on an *en masse* basis, like the fee restraints in this case, would thwart the incentives which Congress deemed so critical. Even waivers on a case-by-case basis, after the litigation has run its course, have been denied effect. *Cf. Committee on Professional and Judicial Ethics of N. Y. City Bar Ass'n.*, Opinion No. 80-94, *summarized at* 50 U. S. L. W. 2204-05 (Sept. 20, 1981) (persistent demands by defense counsel for a waiver of statutory fee awards found to be a serious threat to the effectiveness and purposes of such awards and to be contrary to the obligations of the Code of Professional Responsibility).

appeals stated, this argument confuses public funding of legal services with awards of attorney's fees by judicial determination in specific types of litigation, as authorized by statute. (Pet. App. at 18a).

Obviously, the Commonwealth's funding of legal service programs is not an effective substitute for the Fees Awards Act, which is designed to promote the private enforcement of federal civil rights laws by offering certain economic inducements through the availability of fee awards. *See* H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 19 (1976); *Rodriguez v. Taylor*, 569 F. 2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).[6] While funding of legal services furthers the representation of the indigent, it does not provide the incentives to undertake the representation in civil rights litigation which Congress hoped to encourage.[7]

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6. Congress clearly viewed the ability to seek fees under the Fees Awards Act as a right of critical significance. *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U. S. Code Cong. & Ad. News 5908, 5910 and 5913. The Senate Report put it succinctly:

> [T]he effects of such fee awards are ancillary and incident to securing compliance with these laws, and . . . fee awards are an integral part of the remedies necessary to obtain such compliance . . . If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in this case. *Id.* at 5913.

7. Moreover, the threat of fee awards serves as an inducement to compliance with civil rights laws and early settlement of such litigation. *Dennis v. Chang*, 611 F. 2d 1302, 1307 (9th Cir. 1980); *Rodriguez v. Taylor*, 569 F. 2d at 1245. *See also* Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 Harv. L. Rev. 411, 414, 418-19 (1973). Advance funding provides no such inducement.

It is also indisputable that legal service programs, like private attorneys, are intended recipients of fees under the Fees Awards Act.[8] *Dennis v. Chang*, 611 F. 2d 1302, 1306 (9th Cir. 1980). Because legal services organizations necessarily operate on an increasingly limited budget, they must consciously balance their case load against the realities of limited manpower and economic resources. *Rodriguez v. Taylor*, 569 F. 2d at 1245. *See also Incarcerated Men of Allen County Jail v. Fair*, 507 F. 2d 281, 286 (6th Cir. 1974); Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 Harv. L. Rev. 411, 414 (1973). Awards of fees to such organizations in civil rights cases encourage representation of clients seeking redress in that area—precisely what Congress intended by enacting the Fees Awards Act.[9]

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8. In *Incarcerated Men of Allen County Jail v. Fair*, 507 F. 2d 281 (6th Cir. 1974), the court awarded attorney's fees to a legal service organization prior to the Fees Awards Act. That case is cited with approval in the legislative history of the Fees Awards Act. H. R. No. 94-1558, 94th Cong., 2d Sess. 18, n. 16 (1976). *Cf. Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240, 262-63, n. 36 (1975) (legislative history of the Legal Services Corporation Act of 1974, 42 U. S. C. § 2996, indicated no intent to restrict the recovery of fees by the Corporation or its recipients).

9. Indeed, an award to a legal services program goes further towards the concept of private enforcement than does an equal award to a private attorney. Such awards have a multiplier effect because any fees recovered support additional legal services for the poor. Legal service organizations are peculiarly important recipients of attorney's fees because of the unique enforcement role that they serve. *See Rodriguez v. Taylor*, 569 F. 2d 1231, 1248 (3d Cir. 1977).

II. Alternative Grounds Exist for the Decision Reached by the Courts Below.

A fair reading of the district court opinion reveals that the court was ready to award fees to CLS regardless of any contract law analysis and was empowered to do so because the equitable authority of federal courts is not constrained by technical doctrines of contract law. *See United States v. Coca-Cola Bottling Company of Los Angeles,* 575 F. 2d 222 (9th Cir. 1978), *cert. denied sub nom., Aqua Media, Ltd. v. United States,* 439 U. S. 959 (1978). Clearly, the Commonwealth cannot contractually avoid the equitable powers of federal courts. *See Dodge v. Tulleys,* 144 U. S. 451, 457 (1892). Hence the issue raised by Petitioners would not resolve this matter in any event since fees could have been awarded here in an exercise of the court's traditional equitable powers, now codified by the Fees Awards Act. *See Hall v. Cole,* 412 U. S. 1, 4-5 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 392-93 (1970). Moreover, numerous courts have held that private fees agreements do not control awards of fees under the Fees Awards Act. *See, e.g., Krause v. Rhodes,* 640 F. 2d 214, 218-19, n.5 (6th Cir.), *cert. denied sub nom. Sindell, Lowe & Guidubaldi v. Ohio,* — U. S. —, 102 S. Ct. 140 (1981); *Fleet Investment Co. v. Rogers,* 620 F. 2d 792 (10th Cir. 1980); *Sargeant v. Sharp,* 579 F. 2d 645 (1st Cir. 1978).

There are also independent grounds for denying effect to the fee restraint in each of the funding contracts based upon State contract law. The fee restraint in the 1979-80 contract was inoperative because of the non-occurrence of a condition to its enforceability. Although the court of appeals did not rely on this rationale, it found that "CLS'

letter acknowledged that the question of the no fees restriction was *sub judice* and that its obligations under that provision were conditional on the court in *Bolden* holding CLS to be bound by the similar provision under challenge in that case". (Pet. App. at 7a, n. 3). That condition failed when Judge Green held in *Bolden* that the fee restraints were invalid.

With respect to the 1980-81 contract, the court of appeals decision suggests that if still another alternative ground were necessary, it was not reluctant to find that the fee restraint was also voidable as a product of economic duress.[10]

Thus, certiorari would also be inappropriate for the further reason that the decision of the court below is independently supported by the Federal judiciary's equitable powers and State law contract principles.

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10. The court of appeals noted:

"[F]or the sake of factual completeness it is important to stress that DPW had insisted that it would not provide any 1980-81 funding for any social program which had not signed a contract which conformed to DPW demands (including the no fees provision). Appendix at 117a. On June 26, 1980, CLS unexpectedly suffered a $118,000 reduction in its Title XX reimbursements for expenses incurred during April and May of that year. Appendix at 116a. In June 1980, CLS was facing its second successive annual funding cut by the Commonwealth which had already resulted in service reductions and a 20% decrease in attorney staff. Appendix at 115a." (Pet. App. at 8a, n. 6; *see also* Pet. App. at 37a, n. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 1, 1982

Office - Supreme Court, U.S.
FILED
OCT 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-385

In the Supreme Court of the United States

October Term, 1982

HELEN B. O'BANNON et al.,
Petitioners

v.

JACK SHADIS et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. This Case Remains of Current Importance to the Administration of State Funded Legal Service Programs

Respondents argue that a grant of certiorari would be pointless because the Commonwealth of Pennsylvania now seeks its original objectives by statute rather than by contract. Respondents' Brief at 3. They are referring to Act No. 1981-5A which appropriated state funds for legal services for the 1981-82 fiscal year that ended June 30, 1982. It said:

> For legal services 1,250,000
>
> Provided that any award of attorney's fees from any Commonwealth agency or official to a legal service provider supported in whole or in part directly or by contract under this appropriation shall be paid exclusively from this appropriation.

The year to which the statute applied has now ended. No similar statute was enacted for fiscal year 1982-83, in fact, no specific appropriation for legal services was made at all. Legal services are still being funded by the Department of Public Welfare through a contract with Pennsylvania Legal Services Center, Inc. This contract contains a clause stating:

> The contractor and subcontractors may not accept attorneys fees in any cases brought against the Commonwealth or Commonwealth employees.

Thus, the issues raised by the petition here remain of current importance to the administration of social service programs in Pennsylvania.

II. The District Court Neither Had Nor Expressed Any Grounds for an Award of Fees That Would Not Have Been Barred by the Contracts

Respondents claim that the district court was ready to award fees to CLS regardless of any contract law analysis. Respondents' Brief at 9. However, they cite no language from the district court opinion to support this claim, and none can be found. More importantly, the district court had no grounds for awarding fees other than the Attorneys Fees Awards Act. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that the courts had no general equitable power to award fees and could award them only in limited circumstances, none of which were urged or considered here. And even if the court did have such power, it still would have had to determine whether the contracts were a valid waiver of the right to request or benefit from an exercise of that power. Thus, the validity of the contracts remains the dispositive issue in this case.

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